

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DOUG K. MACEJEWSKI
Claimant

VS.

KCOB I LLC d/b/a FUDDRUCKERS
Respondent

AND

UNINSURED
Insurance Carrier

AND/OR

WORKERS' COMPENSATION FUND

Docket No. 216,321

ORDER

Workers' Compensation Fund requested review of the April 29, 2005 Award by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on November 8, 2005.

APPEARANCES

Catherine A. Donnelly of Kansas City, Missouri, appeared for the claimant. John B. Rathmel of Merriam, Kansas, appeared for insurance carrier, AIG.¹ Michael R. Wallace of Shawnee Mission, Kansas, appeared for the Workers' Compensation Fund.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

¹ DAKA International was not a party to this claim and its insurance carrier AIG initially appeared only because the Workers Compensation Division had erroneously listed AIG as the workers compensation carrier for respondent.

ISSUES

The Administrative Law Judge (ALJ) found the claimant sustained a 15 percent permanent partial functional impairment and, pursuant to K.S.A. 44-532a, assessed the award against the Workers' Compensation Fund (Fund).

The Fund requested review and argues that respondent's insolvency was not established. The Fund further argues the ALJ erred in not determining whether the previous owner of the business the respondent purchased was responsible for providing workers compensation insurance coverage on this claim.²

Claimant argues that the undisputed evidence established respondent was uninsured on the date of his accident, is insolvent and cannot be located to pay this claim. Consequently, claimant requests the Board to affirm the ALJ's Award.

AIG, the insurance carrier for the previous owner of the business respondent purchased, likewise requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant brought this claim against his employer, KCOB 1 LLC, and also impleaded the Fund pursuant to K.S.A. 44-532a, alleging respondent was uninsured and otherwise unable to pay workers compensation benefits.

The uncontroverted evidence established that claimant was hired by respondent, KCOB 1 LLC, doing business as Fuddruckers Restaurant. Moreover, on the date of claimant's work-related injury on June 9, 1995, the respondent, KCOB1 LLC had not secured the payment of compensation to its employees by insuring the payment through an insurance carrier. Joseph R. O'Brien, the managing partner and a member of the respondent limited liability corporation, testified that during the years respondent operated and until it closed it was never in a financial position to pay the medical bills claimant incurred as a result of his injury. Finally, Mr. O'Brien testified that respondent, as of 1997, had no assets, was no longer operating nor had it been revived.

² There is no dispute claimant is entitled to an award based upon a 15 percent functional impairment.

If the Act applies, which it does in this case, the employer is liable to pay compensation to the employee.³ The employer is required to secure the payment of compensation to its employees by either insuring the payment through an insurance carrier, or by qualifying as a self-insured or by securing a membership in a qualified group-funded workers compensation pool.⁴ But if the employer has no insurance to secure the payment of compensation, and the employer is financially unable to pay the compensation, the injured worker may apply to the director for the compensation benefits to be paid by the workers compensation fund.⁵ And it is not the claimant's burden to prove the employer is uninsured or otherwise unable to pay the owed compensation benefits.⁶

K.S.A. 44-532a(a) (Furse 1993) provides:

If an employer has no insurance to secure the payment of compensation, as provided in subsection (b) (1) of K.S.A. 44-532 and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, or such employer cannot be located and required to pay such compensation, the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund. Whenever a worker files an application under this section, the matter shall be assigned to an administrative law judge for hearing. If the administrative law judge is satisfied as to the existence of the conditions prescribed by this section, the administrative law judge may make an award, or modify an existing award, and prescribe the payments to be made from the workers compensation fund as provided in K.S.A. 44-569 and amendments thereto. The award shall be certified to the commissioner of insurance, and upon receipt thereof, the commissioner of insurance shall cause payment to be made to the worker in accordance therewith.

The primary purpose of the Workers Compensation Act is to expeditiously provide an award of compensation benefits to an injured employee.⁷ The Legislature intended, by enacting K.S.A. 44-532a, that the Workers' Compensation Fund be the party responsible for pursuing those respondents who are without insurance and refuse to pay benefits as ordered when it appears they are financially unable to meet their obligation under the Act.

³ See K.S.A. 44-501(a) (Furse 1993).

⁴ See K.S.A. 44-532(b) (Furse 1993).

⁵ See K.S.A. 44-532a(a) (Furse 1993).

⁶ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, Syl. ¶ 5, 899 P.2d 501 (1995).

⁷ *Workers Compensation Fund v. Silicone Distributing, Inc.*, 248 Kan. 551, 809 P.2d 1199 (1991); and *Hobelman v. Mel Krebs Construction Company*, 188 Kan. 825, Syl. ¶ 5, 366 P.2d 270 (1961).

Pursuant to K.S.A. 44-532a(b) the Commissioner of Insurance, acting as the administrator of the Fund, then has a cause of action against the respondents to recover the amounts paid to the claimant.

The dispositive fact is that claimant's immediate employer was KCOB 1, LLC. And that employer had admittedly not secured the payment of compensation to its employees by insuring the payment through an insurance carrier. Accordingly, respondent did not have workers compensation insurance coverage on the claimant's accident date. The respondent's managing partner testified the respondent was unable to pay compensation benefits to the claimant because it was no longer in business and its assets were liquidated. This is exactly the factual situation contemplated by K.S.A. 44-532a. The Board affirms the ALJ's determination that the Fund pay the benefits on this claim.

DAKA International had operated the Fuddruckers Restaurant until May 1, 1995, when it sold the assets of the restaurant to respondent. The Fund contends the ALJ erred by not resolving an alleged dispute between respondent and DAKA regarding which entity was responsible for workers compensation coverage. The dispute, if any, between the respondent and DAKA concerning DAKA's obligation to pay workers compensation benefits to respondent's injured employees is a separate contract dispute between those parties.⁸

It was undisputed that claimant was an employee of respondent. Respondent had not secured the payment of compensation to its employees by insuring the payment through an insurance carrier. As a result the respondent did not have workers compensation insurance on the date of claimant's accident. The claimant need only assert a compensation claim against his immediate employer. If the uninsured employer from which compensation is sought is insolvent or cannot be located, the Fund may be impleaded. If the Fund is ordered to pay benefits on a claim, it may assert a K.S.A. 44-532a(b) cause of action against either the insolvent or unlocated employer. That is what occurred on this claim and the ALJ's Award is affirmed.

The Board is mindful that the Fund's brief also alleges there was no indication that Mr. O'Brien was insolvent. Again, claimant's employer was respondent and not Mr. O'Brien. Mr. O'Brien may have supervised claimant but he was not claimant's employer.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated April 29, 2005, is affirmed.

⁸ See, *Workers Compensation Fund v. Silicone Distributing, Inc.*, 248 Kan. 551, 809 P.2d 1199 (1991).

IT IS SO ORDERED.

Dated this _____ day of December 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Catherine A. Donnelly, Attorney for Claimant
John B. Rathmel, Attorney for AIG
Michael R. Wallace, Attorney for WCF
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director